LODE LOCATIONS: A SPECIFIC QUESTION OF EXTRALATERAL RIGHTS AND A GENERAL THEORY OF INTRALIMITAL RIGHTS.

II. INTRALIMITAL RIGHTS TO ORE[1] IN LODE LOCATIONS.[2]

THE term intralimital rights, though very useful, is one that should be used only with great care. This is so because an intralimital right to ore, the right of a lode locator to ore on the dip of a vein within the limits of his location, may be of either one of two natures — it may be a right based on ownership of an apex to which such ore can be referred,[3] an apex right, or it may be a right based on ownership of a surface overlying such ore, a common-law right. Since Mr. Lindley first incorporated the term intralimital rights into the phraseology of mining law, however, it has been so loosely used in contradistinction to the term extralateral rights as gradually to lose its exact significance, and to become confounded with and used as a synonym for the narrower term, common-law rights.

It is easy to trace the process whereby this confusion was at, for since extralateral rights cannot be other than apex rights, — that is, rights on the dip of a vein based on ownership of the apex of such vein, — the term used in contradistinction to the term extralateral rights gradually came to be used also in contradistinction to the term apex rights, and so as synonymous with the term common-law rights. As a natural consequence, the term extralateral rights has become confounded with and used as a synonym for the broader term, apex, or dip, rights. So great has become this confusion as to mislead, it is submitted, even a very able court — as will be shown in the hereinafter contained discussion of the Jefferson case.

Lindley[4] accurately defines the terms intralimital rights and extralateral rights as follows:

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[1] Surface rights will not be discussed.

[2] Continued from 22 HARV. L. REV. 288.

[3] Ore, on the dip of a vein, which lies between a given set of dip-right bounding planes, is spoken of throughout this paper as being referable to that part of the apex of the same vein which is included between the same planes.

[4] All references to Lindley are to Lindley, Mines, 2 ed.

"§ 549. *Classification of rights with reference to boundaries.* — Property rights conferred by lode locations may be subdivided for the purpose of convenience into two classes: —

"(1) Those which are confined to things embraced within the boundaries of the location. By the term 'boundaries,' as we here employ it, we include not only the surface lines, but the vertical planes drawn downward through them. If we may be excused for introducing into the mining vocabulary coined and eccentric words, we would classify these rights as *intralimital;*

"(2) Those which, while depending for their existence upon the ownership of things within the boundaries, may be exercised under certain conditions and restrictions out of, and beyond, those boundaries. These rights may be classified as *extralimital.*" [5]

It is to be noted that the above statement does not classify the two kinds of property rights conferred by lode locations according to their natures and extents, but merely according to the *loci* of their application. It clearly appears, of course, from the very meanings of the words intralimital and extralateral, that all rights based on ownership of an overlying surface must necessarily be intralimital, and that all extralateral rights must necessarily be based on the ownership of some property other than an overlying surface; the reverse propositions, however, are not necessarily true — that is, it does not necessarily follow that all intralimital rights must be based on ownership of an overlying surface, or that all rights based on the ownership of some property other than an overlying surface must be extralateral. In other words, — for this should be made very clear, — although all rights based on ownership of an overlying surface must necessarily be intralimital, and although all extralateral rights must necessarily be based on ownership of an apex, it does not logically follow from this that rights based on ownership of an apex may not also be intralimital as well as extralateral; wherefore it may not be said that apex rights must always be extralateral rights or that intralimital rights must always be based on ownership of an overlying surface. An extralateral right must always be an apex right, and a common-law right must always be an intralimital right, but an apex right may be either an intralimital right or an extralateral right, and an intralimital right may be either an apex right or a common-law right.

[5] Extralimital rights are, of course, co-ordinate with extralateral rights, for since no right can be exercised across, or beyond, the extended end lines, extralimital rights must always be exercised, if at all, only across the lateral, or side, lines. The term extralateral right, therefore, is merely a more specific term to import the idea of a right exercised without the limits of a location, across a side line.

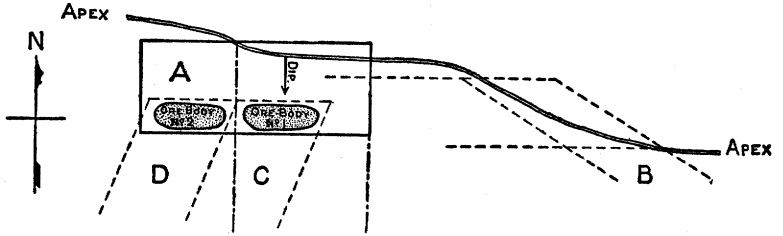
Under our system of mining jurisprudence, of course, a lode locator may base a right to a given body of ore on the dip of a vein on one of two grounds: either that he owns a surface including an apex to which such ore can be referred, or that he owns a surface overlying such ore. That ownership of a properly located apex gives the locator thereof a right, between his dip-right bounding planes, to that part of the dip of the vein which underlies his own surface as well as to that part which underlies the surface of another lode locator, would seem to be clearly indicated by the wording of the statute itself[6] to the effect that a locator shall have the right to a vein which apexes within his location throughout its "entire" depth, "although" in following the dip of such vein he may pass outside the territory underlying the surface embraced by his boundaries. Indeed it would seem unbelievable that a locator might exercise a right outside of his location which he might not exercise within it — that he might gain a right by crossing his boundaries. On the contrary, it would seem certain that if a right based on ownership of an apex operates to give the locator the vein outside of his location, *a fortiori* such right must operate to give him the vein inside of his location. The surface boundaries of a location, then, play no part in a determination of a question as to whether or not a locator has an apex right to a given body of ore, except in so far as it is to be determined from them how much of the apex lies within the territory of such locator, and except in so far as the dip-right bounding planes are to be established with reference to the direction of the end lines.

Now since the owner of an apex to which a given body of ore can be referred has a right to such ore even though it underlies the surface of another lode locator, it appears that the two kinds of property rights conferred by lode locations are not of equal dignity, that is, that rights to ore are based primarily on ownership of an apex, rights based on ownership of an overlying surface being operative only in the absence of apex rights. An apex right, then, is the right of a lode locator, the end lines of whose location are parallel, to take so much of the dip of a vein as he has of its apex, i. e., the right of a lode locator who has located a surface containing an apex to follow the dip of his vein, from such apex, not only inside but even outside the territory underlying the surface embraced by the boundaries of his location, between planes

[6] U. S. Rev. Stats., § 2322.

applied at the points where the apex departs from his territory and drawn through or parallel with the non-divergent end lines, and to take all the ore between such dip-right bounding planes which is not also included between the dip-right bounding planes of a senior locator of another part of the same apex — such right being intralimital or extralateral according to the *locus* of its application. A common-law right (so called because, being a right on and under a given surface, based merely on ownership of such surface, it is a right analogous to a right known to common law), then, strictly speaking, is merely the right of a lode locator to use his surface, and to take so much of the ore underlying such surface as neither he himself nor anyone else can have a right to by virtue of ownership of an apex — a right in the nature of an omnibus right to what is left after all apex rights have been exhausted. Finally it is submitted that since one and the same right, namely, a dip right based on ownership of an apex, may be either intralimital or extralateral, according to the *locus* of its application, the two kinds of property rights conferred by lode locations, where enquiry is had as to their natures and extents, should be classified, according to the sources from which they spring, as apex, or dip, rights and common-law rights, and that the terms extralateral and intralimital should be used only to indicate the *loci* of application of such rights, an extralateral right being merely an apex right applied without the limits of a location, and an intralimital right being either a common-law right or an apex right applied within the limits of a location.

Now to illustrate the natures and extents of the rights of a lode locator to ore within the limits of his location, let us state a supposititious case wherein the surface of a given location overlies two bodies of ore, one of which is referable to an apex outcropping within the location, and the other of which is not — as shown by Location A on the following diagram: —



In this case, it is submitted, A's ownership of ore body No. 1 is dependent wholly on his ownership of the apex, and not at all on

his ownership of the overlying surface, that is, his right to the ore, though it is an intralimital right, is not a common-law right, but an apex right. If, for example, it should develop that the apex right were in another, — as where the ore in question be found also to lie within the dip-right bounding planes of a senior locator of another part of the same apex (see Location B on above diagram), — in such case A's ownership of the overlying surface would profit him not at all; or if, on the other hand, it should develop that the ownership of the overlying surface were in another, — as where such surface also lies within the boundaries of another location whose seniority later becomes established (see Location C on above diagram), — in such case it would seem to be certain that A's right to the ore, so long as he retained the apex, would still survive. On the other hand A's ownership of ore body No. 2, since it is not included between the dip-right bounding planes, is dependent wholly on ownership of the overlying surface. Thus if the seniority of Location D should later become established, A would be deprived of the ore.[7]

In the Jefferson case[8] whether an intralimital right was a common-law right or an apex right should have been the question

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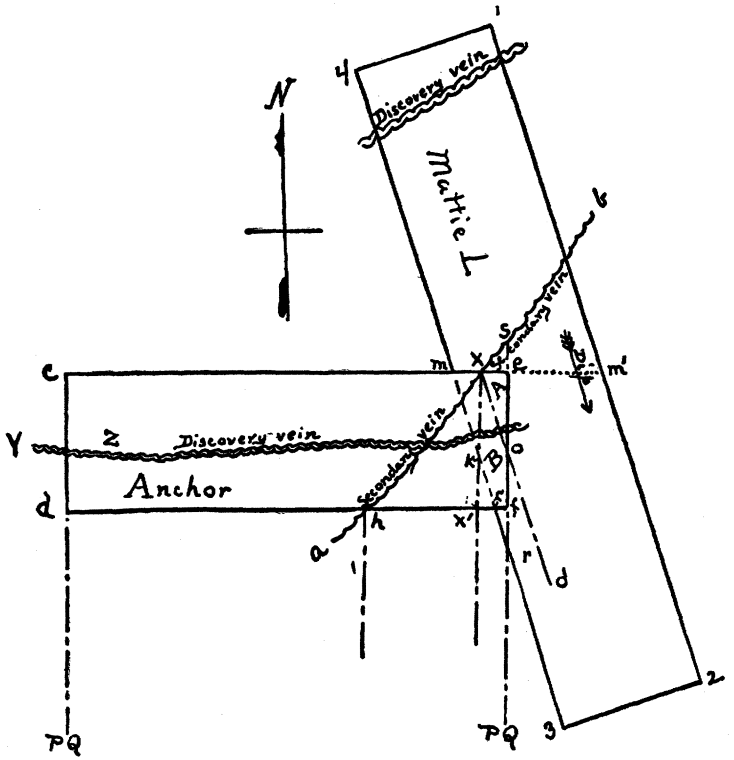
[7] If the end lines of Location A were widely divergent, no dip-right bounding planes could be established. In such case it might be argued that A could have no apex right to any ore whatever, even within the limits of his location. It is believed, however, that such a contention would be fallacious. Parallelism of end lines, and the consequent establishment of dip-right bounding planes, are necessary to the exercise of extralateral rights, but extralateral rights only. It is true that where dip-right bounding planes have been established they limit the territory in which apex rights may be exercised, not only outside but also inside a location, but it does not necessarily follow that where no dip-right bounding planes can be established, ownership of the ore on the dip of a vein, inside the location, may not be based on ownership of that part of the apex which is included within the same location, in a case where the ore is so situated with respect to the apex that it would have been included between the dip-right bounding planes which would have been established had the end lines been parallel. Lindley, writing of irregularly shaped locations, states (p. 911): "In such cases the right to pursue the vein on its downward course outside . . . may not exist; but in other respects the locator's right to whatever may be found within . . . is the same as in the case of a location of the highest type. It is unquestionably true that neither the form of the surface location nor the position of the vein as to its course controls or restricts the intralimital rights." Whether or not this statement is too broad as applied to the specific question under consideration, at least it may be said that an extralateral apex right differs from an intralimital apex right in this, that the establishment of dip-right bounding planes is necessary to the exercise of the former, but not to the exercise of the latter, notwithstanding that, if established, dip-right bounding planes limit the territory within which the latter, as well as the former, may be exercised.

[8] Jefferson M. Co. *v.* Anchoria, etc., Co., 32 Col. 176, 75 Pac. 1070, 64 L. R. A. 925.

with respect to which the respective rights of the parties to the litigation should have been determined. The facts in the Jefferson case are illustrated by a plat contained in Part I of this article,[9] here reproduced for the purpose of convenience: —



The statement of facts, and of the question which, it is submitted, should have been presented for the consideration of the court, as given in Part I of this article, is here repeated, in part, as follows: "The Anchor was the senior location. The ore bodies in dispute were on the dip of the vein *a–b*, and lay under the surface of the Anchor, within the parallelogram *x–x'–f–e*, less the triangle *k–n–x'*. The decision awarded all the ore bodies in dispute to the owner of the Anchor. . . . The owner of the Anchor could not base a claim to the ore within this territory upon ownership of an apex, for its apex rights were bounded on the east by the plane *x–x'*.[10] Being

[9] See 22 HARV. L. REV. 266. — A Question concerning the Extralateral Rights Incident to Ownership of a Junior Lode Location which partly Overlaps a Senior Lode Location.

[10] The doctrine of Walrath *v.* Champion (171 U. S. 293), it is true, if applied to this case, would allow rights on the secondary vein conterminous with the rights on the

the owner of the senior location, however, and therefore the owner of all surfaces in conflict with the junior location, it could claim a common-law right to all ore within this territory to which the junior locator had no apex rights. Apparently, then, the whole controversy should have turned . . . upon a determination of a question as to whether or not the junior locator had so located the apex of the vein as to give him rights on the dip thereof within any part of the territory under consideration."

The court, in awarding all the ore within the territory under consideration to the owner of the Anchor, however, based its decision on the ground that such territory, since it underlay a surface of conflict between the two locations, must be considered as embraced by the boundaries of (*i. e.*, as intralimital to) both locations, saying: [11] "the Mattie L. does not own the conflicting ground, still this very ground is actually physically within its surface boundaries." The materiality of this consideration, in the estimation of the court, becomes apparent when it is understood that the court classified the two kinds of property rights conferred by lode locations, according to their respective natures, as intralimital rights and extralateral rights, saying,[12] with reference to the statute: [13] "The property rights conferred by a lode location thereunder are twofold (1 Lindley on Mines, 2d ed. § 549), intraliminal, and extraliminal or extralateral."

The argument of the court, briefly stated, was to the effect that the owner of the Mattie L could base a claim to the ore within the territory in question only on one of two grounds, viz., either that it had intralimital rights thereto, or that it had extralateral rights thereto — that it could have no intralimital rights thereto because the territory in question was also included within the boundaries of a senior location, and that it could have no extralateral rights thereto because such rights are not operative within, but only without, the boundaries of a location; or, in other words, that since the territory did not belong to the owner of the Mattie L, it could have no intralimital rights therein, and since the territory did not lie outside of the boundaries of the Mattie L, it could have no extralateral rights therein.

It is clear that this argument is based upon the assumption that a right exercised inside the limits of a location is necessarily of a

discovery vein — that is, up to the end line *e–f*. That doctrine, however, is here disregarded for the reasons given in Part I of this article.

[11] 64 L. R. A. 929. [12] 64 L. R. A. 930. [13] U. S. Rev. Stats., § 2322.

different nature from a right exercised outside the limits of a location; that is, the court, though it recognized that the rights of a lode locator must be based either on ownership of an overlying surface or on ownership of an apex, failed to perceive that the latter class of rights may be applicable elsewhere than outside the limits of a location. Thus, throughout the opinion, the court has used the term intralimital rights to indicate, exclusively, those rights which are based on ownership of an overlying surface, and the term extralateral rights to indicate, comprehensively, those rights which are based on ownership of an apex. In short, misled by the confusing nomenclature of which it made use, the court premised its argument upon the ground that a lode locator can have no right to ore within the limits of his location unless he owns the surface overlying it — the corollary proposition being that a right based on ownership of an apex is not applicable within, but only without, the limits of a location.

This is abundantly proved by even a cursory examination of the opinion. Thus, in the first place, for the purpose of determining the "nature and extent of the rights of the Mattie L. to all the veins found within its surface lines," [14] the court assumed that "the Anchor was out of the case entirely," [15] that is, that the Mattie L was not in conflict with any other location. In discussing this supposititious case (which is the same as the supposititious case hereinabove put, illustrated, and discussed for a similar purpose), it was urged that the rights of the owner of the Mattie L everywhere within its boundaries, including the territory in question, would be intralimital rights, and from this it was urged that the owner of the Mattie L could have no rights within the territory embraced by its boundaries unless such territory belonged to it, wherefore it could have no rights within a territory of conflict with a senior location. This argument is palpably founded on the premise that all intralimital rights are based on ownership of an overlying surface. In the second place, in another part of the opinion, referring to the right of the owner of an apex to follow the dip of the vein, the court said: [16] "pursuing the vein, a–b, from its apex, which is within the surface lines of the Mattie L., thence downward on its dip, its owner has encountered a segment thereof inside the side lines, and also the end lines, of the Mattie L., which is also within the surface lines of the senior Anchor location. . . . It will not do to

[14] 64 L. R. A. 930. [15] 64 L. R. A. 929. [16] 64 L. R. A. 929.

say that such segment is outside of the side lines of the Mattie L." This refusal to allow the owner of an apex to follow the dip of his vein into the territory of conflict, on the ground that such territory is not outside the limits of his location and so is not subject to the exercise of "extralateral" rights, is clearly an express holding to the effect that rights based on ownership of an apex are not applicable within the limits of a location.

Thus if it be a correct contention that rights other than those based on the ownership of an overlying surface may be exercised within the limits of a location, then it will not logically follow from the fact that part of such overlying surface is owned by another, that the owner of the location can have no rights therein, and the reasoning of the court in the Jefferson case must fail.[17] It is

[17] Another holding of the court was to the effect that even if the territory of conflict might be considered as lying outside the boundaries of the Mattie L, still the owner of that location could have no "extralateral" rights therein, because, in such case, the westerly end line of the location, across which the vein could not be pursued, must be considered to be a crooked course coincident with the intrusive boundaries of the Anchor. The court, of course, still proceeded on the assumption that the right of the owner of the Mattie L to follow the dip of the vein, from its apex, into the territory in question, could not be exercised unless said territory be considered as lying without the boundaries of the location. The court, furthermore, seems to have considered the laying of the westerly end line of the Mattie L across the surface of the senior Anchor to have been "an unlawful act" (64 L. R. A., p. 930) in disobedience of the statute, an act which could give rise to no extralateral rights — yet the doctrine of the Del Monte case (discussed in Part I of this article) is certainly that, under the statute, a junior locator may lay his end lines across a senior surface for the very purpose of securing extralateral rights, and, curiously enough, the court itself, immediately before, had stated that the "law does not require that the bounding lines of a location be laid wholly upon its own territory, . . . but they may be laid along or across other and senior locations. . . ."

The holding of the court was as follows (p. 930 of 64 L. R. A.): "It is not logical to hold that the extralateral rights with respect to this disputed strip are to be defined as though it was territory beyond the Mattie L. side lines. . . . But if the Mattie L. was permitted to draw in its boundaries so as to include therein only the ground actually belonging to that location, . . . the position of the appellant would not be strengthened. On the contrary, it would be left without the vestige of an extralateral right. For then the westerly legal end line (the located westerly side line) of the Mattie L. would be coincident with the northerly side line, the easterly end line, and the southerly side line of the Anchor claim for a certain distance, and thus would be not a straight, but a broken, line, and the westerly end line of the location, as thus laid, would not be parallel with its easterly legal end line, and from a claim thus irregularly located extralateral rights are withheld. The law is that it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. Walrath *v.* Champion Min. Co. 171 U. S. 293."

Now it is submitted that the holding of Walrath *v.* Champion, though correctly stated, is not here correctly applied. That case did not hold that apex rights must be

submitted, therefore, that the enquiry of the court concerning "the nature and extent of the rights of the Mattie L. to all the veins found within its surface lines," should not have been based on a classification of such rights as intralimital and extralateral, but on their classification as apex rights and common-law rights. That is, the enquiry as to the rights of the owner of the Mattie L. to the ore within the territory in question (when the Anchor was considered as "out of the case entirely"), should have been as to whether or not such ore could be referred to an apex within the location, for, if so, then the right to such ore could be lost only by the loss of the apex, and the enquiry as to whether the territory lay within or without the limits of the location could be material only in so far as the territory in question might contain a part of the apex. If such territory did contain a part of the apex, then so much of the ore as could be referred to the part of the apex so contained, would, of course, be lost by loss of the territory, but so much of the ore as could still be referred to an apex outside of such territory would still belong to the owner of the Mattie L — it being immaterial, so long as the ore lay between the dip-right bounding planes of the Mattie L, whether the apex right thereto were intralimital or extralimital.

Now, as shown on the plat, though the surface of all the territory of conflict belonged to the owner of the Anchor, and so may be spoken of as lost to the owner of the Mattie L, and though this territory included a part of the vein *a–b* (to the west of the point *x*), still some of the ore underlying the surface of this territory, — viz., that underlying the surface of the triangle A, — might still be referred to an apex outside of such territory. That is, the apex of

withheld from a location whose boundaries are crooked courses, but that if a crooked course be crossed by an apex, that segment of the crooked course which is crossed by the apex may be considered as an end line, and apex rights are to be determined with respect to such segment alone. The very point raised in Walrath *v.* Champion was that the owner of the Providence location could have no apex rights because the northerly boundary was a crooked course, and so not parallel with the southerly end line, but the court held that the whole of the crooked course was not to be considered as the northerly end line, but only that segment thereof which was crossed by the apex, and that since such segment was virtually parallel with the southerly end line, apex rights must be granted.

It is to be noted further that under no circumstances, not even if (contrary to the doctrine of the Del Monte case) the westerly boundary of the Mattie L be considered to be the crooked course *4–m–e–f–n–3*, could the line *m–e* be considered an end line, for the vein *a–b* is a secondary vein, and the line *4–m*, which is crossed by the discovery vein, would still be the end line of the location under the doctrine of Walrath *v.* Champion.

the vein *a–b*, to the east of the point *x*, indisputably belonged to the owner of the Mattie L, wherefore the plane *x–o–o'*, drawn, parallel with the end lines (the located side lines), from the point where the apex departed on its westerly course from the territory of the Mattie L, defined a dip-right bounding plane to the east of which all ore underlying the surface was referable to an apex included within the territory of the Mattie L. The claim of the owner of the Mattie L to the ore under the surface of the territory indicated on the plat by the triangle A, therefore, should have been based not at all on any claim concerning the surface of such territory, but wholly on ownership of the apex outcropping on its own undisputed surface.[18] Indeed it seems very likely that if such an argument had been insistently presented for the consideration of the court, the owner of the Mattie L would have been awarded the ore underlying the surface of the triangle A, for the court, toward the end of the opinion, expressed itself as follows: "The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, *c*, *f*, *e*, *x* [*x'–f–e–x* on our plat], to each belonging such part of the vein as it has the apex of. . . ."

The two kinds of intralimital rights, then, can be clearly distinguished, and so defined in contradistinction to each other. A definition of each separately, however, based on an analysis of the inherent nature of each, is less clear — at least in the case of common-law rights. An apex right, though of a seemingly difficult, because unusual, nature, in fact readily lends itself to analysis. The apparently simple and elementary nature of a common-law right to ore not referable to an apex, on the other hand, is not, it is submitted, capable of logical solution.

The statute[19] reads, in part, as follows: —

"The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of

[18] If, for example, the locator of the Mattie L had extended the north side line of the Anchor, *c–e*, as his own south side line, *m–m'*, in such case there could have been no doubt as to his right under the surface of the triangle A (Fitzgerald *v.* Clark, 17 Mont. 100; Colo., etc., M. Co. *v.* Turck, 54 Fed. 262). It would seem impossible that the locator of the Mattie L, merely by continuing his westerly end line, in its own direction, across the surface of the senior location, thus creating a surface conflict, would thereby have forfeited any dip right which he would have had had there been no surface conflict. It may be that by the establishment of such surface conflict he would have gained no advantage, but certainly under the doctrine of the Del Monte case he might not be penalized therefor.

[19] U. S. Rev. Stats., § 2322.

their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines. . . ."

A patent issued under this statute expressly reserves, out of a fee granted, so much of the ore underlying the surface as may be referable to apices not included by the boundaries, the limitation being expressed substantially as follows: "That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit." [20]

Thus it is clearly apparent that, under the statute, veins are severed, "throughout their entire depth," from the country rock in which they lie — an apex right being a property right in a vein as distinguished from a property right in the country rock in which it lies and which is subject to ownership under a common-law right.

The nature of apex rights has been analyzed and explained by many writers, and will not be treated of herein otherwise than collaterally to the discussion of the nature of common-law rights — except to point out that an extralateral apex right is not a right created by a statute in derogation of the common law. The government, the grantor of an apex right, is the owner of all territories to which such right may be applied,[21] and the grant is merely a conveyance of a specified territory which has, expressly or by statutory construction, been excepted from prior grants and which must necessarily be excepted from subsequent grants. It is not, in any sense, a right to enter the territory of another, but a fee simple, vested in the grantee at the time when the grant takes effect,[22] to a given parcel of land underlying surfaces owned by others. There is no principle of common law to prevent the

[20] Taken from Snyder, Mines, § 785.

[21] "In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their 'public lands.' By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the Government." Del Monte M. & M. Co. *v.* Last Chance M. Co., 171 U. S. 61.

[22] The ultimate fee, of course, is in the government up to the time of issuance of patent.

owner of land from parcelling it as he may see fit; he may convey only a certain part of his territory to another, or he may convey the whole, excepting a certain part, and the part so granted or excepted may be a vertical section running through the land; or a horizontal section underlying the surface; or a slanting section underlying the surface; or a section irregular in width and direction, like a vein, underlying the surface — provided the exact extent of such section be capable of establishment.[23] The statute creating apex rights, then, does not, in derogation of the common law, grant rights in the territories of others, but merely defines the manner in which, in accordance with the principles of common law, the government will parcel certain of its lands.[24]

The statute clearly grants, to a lode locator, ownership of a surface, and, by necessary implication, ownership of all territory, not specifically excepted, which is incident to ownership of a surface at common law — that is, an inverted pyramid of earth of which the surface of the location is the base and the centre of the earth is the vertex.[25] From this territory, however, the statute expressly excepts all ore which lies on the dip of veins which apex outside

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[23] "Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface," . . . Del Monte M. & M. Co. *v.* Last Chance M. Co., 171 U. S. 60.

"Nothing was more common than to sell or demise a piece of land excepting the mines. In like manner, the different strata of the subsoil might be shown to be the subject of different rights. And there might be also in one mine different minerals which were the property of different persons." Lindley, 15.

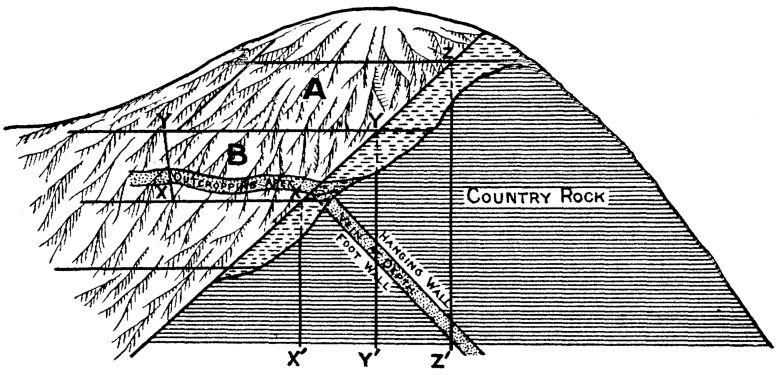
[24] This subject is fully, and very clearly, treated in Lindley, § 568, which reads, in part, as follows: "The government being the owner of the fee may carve from it the ownership of the vein. It may grant the surface to one and the vein to another. There was nothing in the common law which prohibited this severance. In fact, it was expressly sanctioned, . . . Instead of being in derogation of the common law, this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law. . . . This dip or extralateral right is not a mere easement. The estate thus granted in the vein is of the same dignity as that of a title in fee. It *is* a title in fee as to the vein granted. . . . This grant of the fee in the vein may be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rock. The grant of the vein necessarily carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual. But the estate in the granted vein is a fee-simple estate."

[25] "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law *rule* is the general law of the States and Territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface." Del Monte M. & M. Co. *v.* Last Chance M. Co., 171 U. S. 60.

the location.[26] No title whatever passes to such ore: it is expressly excepted by the grant. So much is certain.

It is equally certain, however, that, notwithstanding his utter lack of title thereto, the courts have declared, again and again, that a lode locator has a common-law right to ore beneath the surface of his location that is not owned by tunnel locators or by locators of outlying apices of the veins within which such ore lies. Up to this point there is no objection, other than an academic one, to the application of this rule. It is in accordance with the custom of miners. It is simple and practical. It may even be said to supply a deficiency in the statute, for clearly some statutory provision should have been made for the extraction of ore which might have been made referable to an apex, but which was not.

To make this subject very clear let us state a supposititious case upon which to base an argument, all references to ore, in the discussion, being to ore situated similarly to that in the supposititious case. Thus let a case be supposed wherein a given body of ore underlies the surface of a location owned by A, but lies on the dip of a vein which does not apex within A's location, but within a contiguous location owned by B. Let it be supposed, further, that B has located the apex in such manner as not to acquire an extralateral right to this ore. This can be illustrated by a diagram showing part of the surface of a hill-side entirely covered by lode locations, and a vertical section of the hill made by drawing a vertical plane through the aligned end lines of locations A and B.[27]



[26] "It is quite manifest from a reading of the section that no title passes *by virtue of the location* to any part of any vein which has its top, or apex, wholly outside of the boundaries of such location." Lindley, 909.

[27] The idea for this diagram is taken from Lindley's Figure 10.

In the above diagram the surface boundaries of the locations are shown; also vertical planes, x–x', y–y', and z–z', drawn through the side lines of locations A and B.

The vein matter, or ore, underlying the surface of location A, since it apexes in location B, was expressly severed from the grant to A. Inasmuch, however, as B's end lines, x–y, are widely divergent, B has not complied with that statutory provision under which a locator on the apex may acquire extralateral rights — therefore the ore underlying the surface of location A was not included in the grant to B. Thus it is clear that the title to this ore has never passed out of the government.[28] The government itself, however, cannot extract this ore without entering on A's territory, or on the territory of some one of the surrounding locators. Unless, therefore, some method of extracting this ore be devised, the policy of the government to procure the development of its mineral resources will not be fully carried out, and the very purpose of the mining acts will, to that extent, be defeated.

Now if any person be permitted to extract this ore, it is clear that the owner of the overlying surface should be that person. Under these circumstances, then, it has been adjudged that the owner of the overlying surface may take the ore. Thus a rule has now become established which creates a property right in the owner of an overlying surface to all ore within his location to which no apex or tunnel right can be applied, and this right, whatever may be the source whence it is derived, is called a common-law right. It is not in fact, however, a right at common law, it is merely a right by sufferance — a practical, simple, equi-

[28] No distinction is to be drawn, of course, between ore which lies on the dip of a vein which does not apex anywhere within the overlying location (as in this diagram) and ore which lies on the dip of a vein which apexes partly within the overlying location but which is not referable to the part of the apex so included (as ore body No. 2 in the diagram on p. 342). The contemplation of the statute is that both end lines of a location shall be crossed by an apex, *i. e.*, that the length of the location and the length of the apex included therein, shall be the same. If, however, the length of the apex as actually located is less than the length of the claim, it is clear that the intralimital rights on the dip of such vein must be bounded by the same planes which bound the extralateral rights. There is no expression contained in the statute which would imply that a locator whose surface lines include some portion of an apex shorter than his claim may drift along the vein to the extent that it lies within his territory. The locator of the outlying part of the apex to which such ore is referable is as much entitled to the ore as if it lay on the dip of a vein which did not apex at all within the overlying location, for the locator of the outlying part of the apex is entitled to a corresponding segment of the vein throughout its entire depth. Such segment, therefore, is excepted from the grant to the owner of the overlying location.

table, and necessary solution of a difficulty not capable of solution by the application of legal principles. No legal solution, therefore, should be attempted, other than a broad justification on the ground that the application of this rule gives effect to the policy of the government.

A common-law right to ore having been recognized, it must at some time be held to become a vested right. It may be said, therefore, that a common-law right to ore becomes a vested right at such time as all parts of the apex to which such ore might have been made referable have been so located as not to make such ore referable thereto. It may even be said, perhaps, that a common-law right to ore has its inception at the time of the making of a location, being at that time an inchoate right subject to defeasance upon condition that an apex be subsequently so located as to make the ore referable to such apex. But however far the at best somewhat doubtful doctrine of common-law rights to ore may be elaborated, sight should never be lost of the basic fact that at the time of the grant the ore was actually, even expressly, severed from the estate granted to the claimant of the so-called common-law right.

The common-law right rule has not been universally recognized by the courts. In Jones *et al. v.* Prospect Mt. Tunnel Co.[29] the owners of an overlying surface brought an action sounding in trespass,[30] and for an injunction, against a defendant corporation which was engaged in extracting ore from under their surface. The court said: "A patent for a mining claim is quite a different thing from a patent for agricultural land. The latter conveys the surface of the ground, and all that lies beneath it[31] [citing cases]. The former does not necessarily do so." Thus the court held that "when evidence is produced tending to show that the ledge apexes outside . . . , this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge; and they must now meet this evidence, and overcome it, or they will fail in establishing their title. . . . If the ownership depends upon whether the ledge apexes inside

[29] 21 Nev. 339, 31 Pac. 642.

[30] It is curious to note that although, under the statute, the owner of an overlying surface has no possessory right to ore which is not referable to an apex within his location, and although he has no right of possession thereto even under the common-l w right rule, at least until after all possible apex rights have been exhausted, yet the form of the action frequently brought by the owner of an overlying surface against one who is extracting the ore under an alleged ownership of an apex to which such ore is referable is trespass or ejectment.

[31] But see Lindley, § 612.

the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title. If they do not own the ledge from which the ore was extracted, it matters not who does own it." It will be perceived that this holding was in strict logical conformity with the provisions of the statute — it seems to be to the effect that in a case where a given body of ore lies on the dip of a vein which does not apex within the location, the owner of the overlying surface can have no right to extract such ore under any circumstances. This case, then, apparently denies the common-law right rule. Under that rule evidence proving that the ledge apexes outside the overlying location would indeed be sufficient to show lack of statutory title in the owner of such location, but still would not be sufficient to show that the owner of such location might not extract such ore upon proof that no other locator is, or might be, entitled to it. Under that rule the ownership of the ore does not necessarily depend upon whether the ledge apexes inside the overlying location, and so need not be affirmatively established. The owner of the overlying surface does not depend upon the strength of his own title, but upon lack of title in other locators.

It may be urged that the court in this case did not mean to deny the common-law right rule; that it is not clear, notwithstanding the expressions quoted, that the ore would not have been awarded to the plaintiffs if they had been able to prove that neither the tunnel locator nor anyone else had a right to it; that the discussion was had merely as to a point of evidence, namely as to upon which claimant lay the burden of proof of ownership; and that the holding, therefore, is clear only to the effect that, to prove ownership in himself, the owner of an overlying surface must prove lack of ownership in other actual or possible claimants.

An argument so limiting the holding in this case, however, would seem not to be tenable in view of other decisions. Thus, as authority for the holding in the Nevada case, the court cited Reynolds *et al. v.* Iron Silver Mining Co.,[32] which is a flat denial of the common-law right rule. In that case the ore in controversy lay, under the surface of a placer location, on the dip of a vein known to exist at the time of application for the placer patent, and not referred to therein — wherefore it was excepted

[32] 116 U. S. 687.

from the grant to the plaintiff below. As stated by the appellate court: "There is no assertion by them of prior possession, discovery, or claim to that vein, nor of any other right to it, than that it is found beneath the surface of this placer patent." On the other hand, it was proven in the *nisi prius* court that the ore was not referable to any part of the apex owned by the defendants below, that is, the defendants had no more title to the ore than had the plaintiff. The defendants, however, were in possession, though merely, as stated by the Circuit Court, as "naked intruders." Upon these facts and findings, a verdict was directed for the plaintiff, the court charging: "the defendants show no right or title in the lode at the place in controversy . . . and as to such intruders, the plaintiff's placer title may give a right of possession and recovery." The court, futhermore, refused to give the following instruction asked by the defendants: "The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendants' title." Upon appeal this judgment of the Circuit Court applying the common-law right rule was reversed, the court saying: "The case here must be decided on the correctness of the action of the court in giving that charge, and in refusing to give instructions asked by defendants. . . . If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show *some* title, you have no right to disturb me, it has not been pointed out to us. . . . Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defence against one who has no title at all, and never had any."

Thus it appears that the common-law right rule is not an elementary principle to be taken for granted — that the nature of a common-law right to ore is such that some courts have very logically absolutely declined to recognize it.[33]

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[33] Lindley, § 866, quotes from and discusses Jones *v.* Prospect Mt. T. Co., *supra*, at considerable length. That case, however, has been herein discussed because, it is submitted, Mr. Lindley has treated it not as denying the common-law right rule, but merely in relation to a rule of evidence. Thus he states (pp. 1592–1593): "A, being the owner of the surface, there is a *prima facie* presumption that he owns everything underneath such surface within the vertical planes drawn through the surface boundaries.

In Reynolds *v.* Iron Silver M. Co., however, Mr. Chief-Justice Waite dissented from the judgment in a short opinion which is now supported by the weight of authority[34] establishing the common-law right rule. "They are mere intruders," he said of the defendants, "having wrongfully, and without any authority of law, worked from an adjoining claim under the surface of the placer claim of the Mining Company and taken possession of the mineral in the the lode. Under these circumstances it seems to me the Mining Company has the better right. The question is not whether the company owns the lode or vein, nor whether it has the right to take mineral therefrom, but whether as against a mere intruder it has the better right to the possession. . . . In my opinion the charge of the court was right, and the judgment should be affirmed."

So far have the courts gone in the application of this common-law right rule that, by the weight of authority, a presumption of ownership has been established in favor of the owner of an overlying surface as against the owner of an outlying apex. Thus, curiously enough, even in a case where the ore is in fact referable to an apex, the burden of evidence is upon him who actually owns the ore instead of upon him who certainly was not granted either title or possessory right to it. It may be said, as in Jones *v.* Prospect Mt. T. Co., that the burden of proving title is upon him who asserts title, and never shifts, and that, therefore, if the plaintiff in a possessory action for ore be the owner of an overlying

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This was the rule at common law. Therefore, when A introduces proof of title, and if the action be trespass, shows that ore has been extracted from underneath the surface and proves its quantity and value, he is, *prima facie*, entitled to judgment. It then devolves upon B to establish,—(1) The existence of an apex within his boundaries; (2) The identity and continuity of the vein from its top or apex within such boundaries to the point in dispute. So far we think the courts all agree; but as to the degree of proof required of B, and as to whether the burden shifts during the trial from one to the other, there is some difference of opinion." It is submitted that all the cases do not support this statement. It is undoubtedly true that all the courts agree to a presumption of ownership in the overlying locator, but this presumption is based upon another, viz., that all ore underlying his surface is presumed to apex within his location (see *infra*). If it be shown not to do so, then some cases, notably Reynolds *v.* Iron S. M. Co., *supra*, are clearly to the effect not only that it does not devolve upon B to show an apex right to the ore, but that, even if it be affirmatively shown by A that B has no right, still A may not recover because of lack of right in himself. In other words, certain cases deny the common-law right rule *in toto*.

[34] A discussion of the cases wherein the common-law right rule has been applied is not within the province of this article. Those cases are cited and discussed in the text books. Herein it is intended merely to analyze the nature of the so-called common-law right to ore.

surface, the burden of proof must be upon him. This, in the limited sense in which the term burden of proof should strictly be used, is true. The burden of evidence, however, immediately shifts to the owner of an outlying apex upon proof, by the plaintiff, of ownership of an overlying surface.

All courts, even those which deny the common-law right rule, are agreed that there is a presumption of ownership in the owner of a surface to all ore underlying such surface. In those cases where there is in fact a common-law right to ore, such right, of course, is based on ownership of an overlying surface, but the rebuttable presumption of law that there is a common-law right in the owner of an overlying surface *in all cases*, is not, it is submitted, based on the fact of ownership of the surface, but on another presumption, — one of fact, — namely, that all ore underlying the surface is presumed to apex within the location.[35] Ownership of an overlying surface having been proved, therefore, it devolves upon the claimant under an alleged apex right to prove that the ore does not apex within the overlying location. Further than this all the courts are not agreed. The great majority of cases wherein the common-law right is recognized at all, however, are to the effect that, the ore having been proved not to apex within the overlying location, the burden of evidence does not thereupon shift back to the owner of the overlying surface, it devolving upon him to prove that the ore does not belong to another, but remains with the claimant under an alleged apex right, it being necessary for him affirmatively to prove further that he himself owns the ore, or at least that some one other than the owner of the overlying surface owns it. This rule of evidence, like the common-law right rule itself, seems to be based on practical, rather than theoretical, considerations. That is, the owner of an apex, by following the dip of the vein, may establish his right under the surface of another, if he has any right; but the owner of an overlying surface may not pursue the vein upwards outside of his own territory, and so may not be able to prove that the vein does not apex within the territory of the adverse claimant. The general rule is stated in Leadville Co. *v.* Fitzgerald *et al.*[36] as follows: "within the lines of each location the owner

[35] "Doubtless, the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside the exterior lines of the plaintiffs' patented ground, it would be presumed to apex inside those lines." Jones *v.* Prospect Mt. T. Co., 31 Pac. 644.

[36] Fed. Case No. 8158.

shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one shall show, by a preponderance of testimony, that such deposits belong to another lode, having its top or apex elsewhere." [37]

In conclusion, the pointed and excellent remarks of Mr. Snyder may well be quoted. "Regarding the right of the common law itself," he writes,[38] "as the same is persistently insisted upon by some courts when there is difficulty in finding any other way to turn, it is not inapt to say that it often becomes the *pons asinorum* of the courts. Whenever a case is found which is difficult of solution by reason of being different from all the adjudged cases, some courts resolutely close their eyes to new paths, sought to be marked upon lines recognizing the controlling thought that congress intended to give to the locator as much of the vein throughout its entire depth as he has of the apex; turn their faces from the other potent factor that congress undoubtedly intended to make and did make a severance of the mineral vein, with its incidental and expressed rights, from the rest of the estate, and have insisted, in the teeth of this last expressed statutory right, that the common law, which had nothing to do with creating the estate in the first instance, this having been granted solely by statute, had, in some mysterious manner, so impressed itself upon the grant, not as given by the patent, but in direct opposition to it, that ownership of the surface creates almost a conclusive presumption of ownership of all beneath. . . . The truer presumption ought to be that if a vein of ore is found beneath the surface of a claim which is conclusively shown to apex outside of such claim, it affords proof equally conclusive, that, whoever else may own it, the owner of the particular surface not containing its apex does not own it, at least until it is shown that, within the rules controlling the right to follow the vein on its dip, no other person can claim it, or that the right is at best doubtful."

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[37] "That the weight of authority is in favor of Judge Hallett's decision in the Leadville-Fitzgerald case cannot, we think, be denied." Lindley, 1596.

[38] Snyder, Mines, § 792.